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IN THE SUPREME COURT

OF THE UNITED STATES

JACQUELYN E. HUNTER,

PETITIONER

VS.

GERALD WALLACE DEAN, SHERIFF,

RESPONDENT

NO. 77-6248

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

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JACQUELYN E. HUNTER,

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VS. MISC. NO. _____

GERALD WALLACE DEAN, SHERIFF,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

Jacquelyn E. Hunter, by counsel, respectfully petitions this Court on the following basis for a writ of certiorari to review the judgment of the Supreme Court of Georgia in Hunter v. Dean, 240 Ga. 214, ___ S.E.2d ___ (1977). A copy of the opinion in that case, holding that the Petitioner could constitutionally be denied the opportunity to serve a prison sentence on probation solely because of her involuntary inability to prepay a fine in lump sum, is attached as Appendix xi-xvii. (This is a companion case on the point of law to Barnett v. Hopper, Misc. No. 77-477 [pending application for a writ of certiorari to the Fifth Circuit Court of Appeals].)

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1256(3) to grant the writ because:

(a) the subject of the Petitioner's claims in the State proceedings was her right under the 14th Amendment to enjoy the equal

protection of the laws, particularly her right not to be subjected to invidious penal discrimination on account of her poverty;

(b) her petition is to review a State court judgment rendered on 28 November 1977 in proceedings for a writ of habeas corpus, a civil action, and it is timely under 28 U.S.C. 2101(c) and Rule 22(3) of this Court.

QUESTION PRESENTED FOR REVIEW

Once a State court has determined that probation is an appropriate punishment in a given case, may it, consistently with the Equal Protection Clause of the 14th Amendment, bar an indigent defendant from probation and require her to serve her sentence in prison solely because of her involuntary inability to prepay a fine imposed as a condition precedent to probation?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Protection Clause of the 14th Amendment: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Georgia Code Annotated 27-2709 (Georgia Laws 1972, pp. 604, 609): "The court may, in its discretion, require the payment of a fine or costs or both as a condition precedent to probation."

Georgia Code Annotated 27-2709 (Georgia Laws 1964, p. 496): "In any case where the judge may . . . place on probation any person convicted of a felony, such judge may in his discretion fine such person so convicted not more than $2000 as a condition to such probation: Provided, such defendant shall not be entitled to any rebate or refund of any part of such fine so paid, in any case such probation shall be revoked by law."

STATEMENT OF THE CASE

In December 1976, the Petitioner, then a 17-year old black female, pleaded guilty to a burglary charge in the Terrell (Georgia)

Superior Court, as did a codefendant. Each was sentenced to a two-year prison term, to be probated upon payment of a fine of $165, $50 in fees for her appointed lawyer, and half of the court costs (App. i).[-1)]

Her codefendant's fine was paid and he commenced serving his sentence on probation. The Petitioner's fine was not paid and she was incarcerated under her sentence.

Several months later, with the assistance of volunteer counsel, she sought a State writ of habeas corpus. She directly challenged her disqualification from probation and her confinement for her involuntary inability to pay her fine as a violation of the equal protection of the laws. Basically, she sought a modification of her sentence so as to permit her to pay the fine and costs off in instalments during probation.

After a hearing before the original trial judge, the requirement that she pay $50 in attorney's fees was stricken but she was remanded back to custody under the other provisions (App. ix).[-2)]

She then filed for a federal writ of habeas corpus in the local District Court. That court ordered her released on personal recognizance pendente lite in order that she could exhaust her State remedy without risk of mootness (App. x).

-1) During sentencing, the following colloquy occurred (App. vii):

JUDGE: "Jacquelyn, are you able to pay a fine?"

JACQUELYN EVON HUNTER: "Yes."

JUDGE: "How can you pay it?"

JACQUELYN EVON HUNTER: "My . . . my cousin, Richardson . . . Richardson going to pay it."

JUDGE: "Who?"

JACQUELYN EVON HUNTER: "Richardson. * * * Miss Fannie Richardson and Miss Richardson."

-2) Sub silentio, the court relied upon Calhoun v. Couch, 232 Ga. 467, 207 S.E.2d 455 (1974), and Barnett v. Hopper, 234 Ga. 694, 217 S.E.2d 280 (1975).

On the appeal, the Supreme Court of Georgia sanctioned her confinement, continuing its conflict with the local federal courts over the substantial constitutional issue involved, Hunter v. Dean, 240 Ga. 214, ___ S.E.2d ___ (1977). See Barnett v. Hopper, 548 F.2d 550 (5th Cir. 1977) (application for certiorari pending, Misc. No. 77-477).-3)

REASONS FOR GRANTING THE WRIT

A. The judgment below, that an indigent may be deprived of an opportunity to serve his sentence on probation solely because he cannot prepay a fine, does not accord with the applicable decisions of this Court.

Whatever the constitutional propriety of financial discriminations may be in a civil context, see Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), Dandridge v. Williams, 397 U.S. 471 (1970), San Antonio School District v. Rodriguez, 411 U.S. 1 (1973), fundamentally different considerations operate in the area of the criminal law, Griffin v. Illinois, 351 U.S. 12 (1956), Burns v. Ohio, 362 U.S. 252 (1959), Lane v. Brown, 372 U.S. 477 (1963). See Maher v. Roe, ___ U.S. ___ at ___, n. 6 (1977). Where liberty itself is involved, this Court has said that it is "the central aim of our entire judicial system [that] all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' * * * In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color," Griffin v. Illinois, supra at 17 (citation omitted). "There can be no equal justice," this

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-3) Although Barnett involved a different prosecution at a different time and place and has no connection in fact to this case, its salient facts are virtually identical to those in Hunter v. Dean.

Court concluded, "where the kind of trial a man gets depends on the amount of money he has," id. at 19.

Griffin and its progeny generally dealt with financial barriers to effective access to various procedures for reviewing convictions, e.g., Smith v. Bennett, 365 U.S. 708 (1961), Douglas v. California, 372 U.S. 353 (1963), Rinaldi v. Yeager, 384 U.S. 365 (1966). See also Ross v. Moffitt, 417 U.S. 600 at 606 (1974). This case and its companion, Barnett v. Hopper, supra, present the analogous question of whether a State, having provided a system of probation as ameliorative punishment for those deemed worthy of it, can bar from it one solemnly adjudged qualified solely because he is too poor to prepay a fine. To paraphrase Griffin, this is simply a question of whether the kind of sentence a man serves may depend on the amount of money that he has.

In somewhat different circumstances, which the Supreme Court of Georgia found distinguishable and which the Circuit Court of Appeals found controlling, this Court has answered the question before, Williams v. Illinois, 397 U.S. 235 (1970), Morris v. Schoonfield, 399 U.S. 508 (1970), Tate v. Short, 401 U.S. 395 (1971), though apparently not clearly enough.

It is the principle of these cases with which the judgment below conflicts. Because the Petitioner's confinement was not the result of the direct conversion of a fine into imprisonment, the Supreme Court of Georgia deemed the Williams trilogy inapplicable. But any distinction is one without a difference, particularly without a difference which the Court below has ever articulated. The Petitioner is still confined solely and simply because she is too poor to buy her conditional liberty.

Trial judges have wide discretion in setting individualized sentences, a discretion born of a recognition of the infinite variety of circumstances which exist from case to case, Williams v. New York, 337 U.S. 241 (1949). But neither the width of that discretion nor the complexities of exercising it is any reason to lay aside the promise of equal justice in the 14th Amendment or the ancient pledge

of the Magna Carta ("To no man will we sell . . . right or justice"), as contended by the State of Georgia, Hunter v. Dean, supra. There is no space even under the ample mantle of "sentencing discretion" to permit a State effectively to create invidious classifications among qualified prospective probationers based on illegitimate considerations, cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886). There are recognized limitations on sentencing discretion, see Townsend v. Burke, 334 U.S. 736 (1948), North Carolina v. Pearce, 395 U.S. 711 (1969), United States v. Tucker, 405 U.S. 443 (1972), and certainly among them is the Equal Protection Clause, Tate v. Short, supra.

However, it is Georgia's adamant position that the ability to prepay a fine (either personally or through family or friends) is a legitimate consideration for probation eligibility and that she may therefore explicitly sanction the operation of a sentencing didcretion which results in one type of punishment for the rich and a harsher type for the equally situated poor. Such a wealth discrimination is permissible in her view because it arguably serves a legitimate interest as an indicator of probable success on probation.-4) See Hunter v. Dean at App. xiii-xvi.

On the actual record of this case, however, Georgia's position is in truth only a theoretical one. The record simply supports none of the possible justifications for the Petitioner's disqualification from probation which the Court below offered. It does not disclose what the trial judge's actual rationale was for setting the fine as a precondition. It does not reflect why he adhered to it once her

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-4) Perhaps a State could make a similar case for religion, race, political persuasion, or national origin, but such considerations are no less forbidden under the Constitution. See Griffin v. Illinois, supra at 15.

relatives failed her and her inability to pay as she had hoped became manifest.-5) It certainly does not reflect that the Petitioner deliberately misled the court about either her willingness or her ability to pay the fine (see App. xiv, xvi-xvii) so as to estop her from claiming the equal protection of the laws. See Barnett v. Hopper, supra at 552-53.

But even as a theoretical proposition, the State's argument proves too much. It is true that an indigent probationer might be tempted by his poverty to commit other crimes, but requiring him to pay a fine and to exhaust his limited resources hardly alters that risk. On the other hand, probation may not at all deter his wealthy counterpart whose pocketbook has harmlessly absorbed the law's sting. And just as a family's payment of a fine could arguably demonstrate some sort of "added control" through its interest and confidence, it could as easily indicate an excessive, debilitating indulgence. And while an indigent probationer, excused from fully prepaying his fine, might not have a paid-in financial stake in succeeding, he would have a definite interest in working responsibly to maintain his job and his payments.-6) His wealthier counterpart would have no comparable incentive.-7)

In short, the ability to prepay a fine, personally or through friends or family, is at best an ambivalent consideration. From the

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-5) Since the habeas hearing occurred (before the trial judge) during the term of court in which she had been sentenced, the court had plenary power to modify the sentence in its complete discretion, Georgia Code Annotated 27-2502. See App. xvi-xvii.

-6) In any case, there is no reason, if his earings permit, why the court could not require that he fully pay the fine off during the first months of probation so that he would shortly have the same financial stake in succeeding as the wealthy probationer.

-7) A standard condition of probation in Georgia is that the probationer "(5) work faithfully at suitable employment insofar as may be possible," App. i, Georgia Code Annotated 27-2711.

same faulty premise that wealth is relevant to sentencing can arise an equally cogent--and equally fallacious--argument that it is the wealthy defendant who should be locked up, since a fine may be ineffective, and the poor one permitted to pay a fine.-8)

In any event, ignoring all of the speculation and dangling bootstraps, more than just a "legitimate" State interest is necessary in order to sustain the discrimination by which the Petitioner was denied probation. As wealth is a "suspect" classification in the criminal law, Griffin v. Illinois, supra, Georgia therefore "must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary to the accomplishment of its purpose or the safeguarding of its interest,'" In re Griffiths, 413 U.S. 717 at 722 (1973) (citation omitted, emphasis added).

-8) The Court below suggested that the Petitioner's position "would result in inverse discrimination to defendants under an identical sentence who were financially able to pay the fine immediately," Hunter v. Dean at App. xiii. This argument is difficult to follow since the Petitioner has made no claim that she should be excused the fine, or that she cannot be required to pay it off reasonably early in her probation, or that her probation cannot be revoked if she squanders a fair opportunity to pay it off. Also, any difference between a lump-sum payment and a series of instalments is probably de minimis at best, though doubtlessly most people would prefer the convenience of a single payment.

In any event, this Court noted no problem of inverse discrimination when in Tate v. Short, supra at 400, n. 5, it approved the same sort of instalment arrangement that the Petitioner has requested.

But no inverse discrimination would exist in the last analysis, however, because all the Petitioner is after is the same option that her wealthier counterpart has, a real choice between paying the fine or going to jail. See In re Antazo, 473 P.2d 999 (Calif. 1971).

Approaching it from the other direction, the classification in effect established in the Petitioner's case implicates a recognized fundamental right, her conditional liberty as a probationer, Morrisey v. Brewer, 408 U.S. 471 (1972). Georgia therefore has to meet the stricter standard of demonstrating that her interest in disqualifying poor defendants from probation is "necessary to promote a compelling governmental interest," Shapiro v. Thompson, 394 U.S. 618 at 634 (1969), Williams v. Rhodes, 393 U.S. 23 (1968).

Georgia has done neither of these things. She has yet to show why the Petitioner (or Tyrone Barnett in Misc. No. 77-477) should be denied her grant of probation and made to suffer imprisonment "solely because [she] is indigent and cannot pay the fine in full," Morris v. Schoonfield, supra at 509, Tate v. Short, supra at 398.

B. The Georgia and federal courts are in clear and direct conflict over the substantial constitutional issue embraced in the judgment below, a conflict which only this Court can resolve.

While the decisions of the lower federal courts are accorded great respect in the courts of Georgia, they are only persuasive authority, Dodd v. Newton, 122 Ga.App. 720 at 723, 178 S.E.2d 567 (1970). The Fifth Circuit Court of Appeals has carefully considered and rejected the reasoning of the Supreme Court of Georgia on the constitutional issue in this case, Barnett v. Hopper, supra. The Supreme Court of Georgia has as carefully reconsidered its position in view of Barnett v. Hopper, supra, and just as firmly has adhered to it.

This situation is intolerable from a standpoint of comity. While it is true that in the nature of habeas litigation the federal courts have the last word and that Barnett v. Hopper effectively opens a back door to those denied probation because of their poverty, this is not an effective resolution. It is no substitute for a direct judgment emanating from this Court through the State judiciary. Many indigent State prisoners, particularly those convicted in misdemeanor courts and, on the authority of Hunter v. Dean subjected to relatively

short sentences upon failure to prepay a fine, will simply never find Barnett's back door. If Barnett was erroneously decided, then those few who do will presumably thwart some State interest.

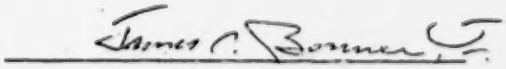
CONCLUSION

The trial judge solemnly determined that the State's penal interests in the Petitioner's case would be satisfied by a fine and probationary service of her sentence. This was an individualized sentence and the Petitioner can have no quarrel with the court's judgment. But she does take issue with the mode of payment which was attached to her fine and which has effectively, irrationally, unnecessarily, and unconstitutionally barred her from the benefits of the probation of which the court deemed her worthy.

Georgia must accomodate her indigency. She cannot offer probation only to those who can purchase it. Whether a person can pay a fine immediately has no apparent relationship to punishment or to rehabilitation. It meets no State interest no served as well or better by instalment payments.

It makes no constitutional difference that the Petitioner's confinement did not result from the direct conversion of a fine into imprisonment (as in the Williams trilogy). The result was identical: she was "subjected to imprisonment solely because of [her] indigency."

Barnett v. Hopper, supra, was correctly decided; Hunter v. Dean was not. This Court should grant a writ of certiorari and reverse the judgment below.



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